

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1300

Docket No. T-3130
74-1300

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS MOORE, ET AL.
Appellant

B

v.

JOSEPH BETIT, ETC., ET AL.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF VERMONT

Docket No. 73-2

APPENDIX - APPELLANT



DOUGLAS MOLDE, Esq.
Vermont Legal Aid, Inc.
54 Lake Street
St. Albans, Vermont 05478

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

DATE 1973	PROCEEDINGS	Date Of Judgment
Jan. 3	Filed Complaint.	1.
" "	Issued Summons.	
" 9	Filed Summons returned served.	2.
Feb. 7	" Defts.' Answer.	3.
" 16	" Pltfs' Interrogatories to Paul Philbrook, Acting Commissioner of the Department of Social Welfare in his official capacity.	4.
" 22	Filed Pltfs' Request for production of Documents to Defendant, Paul Philbrook, Acting Commissioner of the Department of Social Welfare in his official capacity.	5.
Mar. 5	Filed plaintiffs' request to admit.	6.
" "	Filed plaintiffs' Motion to Amend.	7.
Apr. 16	" Motion of Vermont Welfare Rights Assoc. to Intervene.	8.
May 21	Filed Defendant Paul Philbrook's Answer to Interrogatories.	9.
July 27	Filed Defendants' consent to plaintiffs' motion to amend complaint and Vermont Welfare Rights Association's motion to intervene.	10.
" "	Filed Order - - granting motions of plaintiffs to amend and motion of Vermont Welfare to intervene. Copy mailed to attorneys.	11.
" "	Filed Intervenor's complaint.	12.
Aug. 6	Filed Notice and Order re memoranda. Mailed copy to attorneys.	13.
" "	Filed Notice of Pretrial Conference sch 9-20-73.	14.
" 8	Filed Plaintiff's Proof of Service.	15.
" 17	" Plaintiffs' Motion to Amend.	16.
" "	" Intervenor's Motion to Amend.	17.
" 22	Filed Plaintiffs' Motion to Amend Complaint.	18.
" 23	Filed Pltfs' and Intervenor's Memorandum on Class action and Motions to amend.	19.
" 28	" Notice of Appearance of Stephen R. Elias, Esq., VLA, for Pltfs, Thomas Moore and Edward Arburso.	20.
" 29	" Defts' Consent to Amendment filed August 22, 1973 (paper No.18)	21.
Sept. 6	Filed Notice of Appearance of David L. Kalib, Esq. of the Office of the Attorney General on behalf of defendants.	22.
" "	" Defendant's motion to dismiss.	23.
" "	" Defendants' response to plaintiffs' memorandum on Motion for a class action.	24.
" 10	Filed Plaintiffs' Trial Memorandum of Facts and Law.	25.
" 11	" Defendants' Trial Memorandum.	26.
" 19	Filed Plaintiffs' Motion to Withdraw Motions to Amend The Complaint Dated August 15, 1973 and August 16, 1973, and Motion for Leave to file a Second Amended Complaint.	27.
" "	Filed Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.	28.
" 20	In Chambers before Judge Coffrin, upon consideration of Plaintiffs' and intervenor's motion to amend Complaint, it is	
" "	Ordered: Motion granted. Stephen R. Elias, Esq. and Douglas Molde, Esq. for Plaintiffs. David Kalib, Esq. for Defendants.	
" "	Filed second amended Complaint.	29.
" "	Hearing on class action status.	
" "	Mr. Elias withdraws request for class action.	
" "	Pre trial conference held.	
" "	Hearing on defendants' motion to dismiss.	
" "	Statements made to Court by Mr. Kalib, followed by Mr. Molde and Mr. Elias.	
" "	Decision reserved on motion to dismiss.	
" "	Filed proposed pre-trial conference order.	30.
Dec. 27	Filed Opinion and Order--It is hereby Ordered: That this action be	

DATE 1973	PROCEEDINGS	Date Of Judgment
Dec. 27	and it hereby is dismissed for lack of jurisdiction. Mailed copy to Attorneys.	31.
1974		
Jan. 22	Filed Pltff's (Moore) Notice of Appeal. Mailed copy to Douglas L. Molde, Esq., Stephen R. Elias, Esq., Benson D. Scotch & David L. Kalib, Esq., Judge Coffrin, Court Reporters and Mr. Fusaro.	32
" "	" Pltff. Moore's Motion to Proceed in forma pauperis.	33
" "	" Pltff. Moore's Affidavit in support of Motion to Proceed on Appeal in forma pauperis.	34
" "	" Pltff. Moore's Request to extend time in order to perfect appeal.	35
" "	" Intervenor Pltff. Vt. Welfare Rights Assoc.'s Notice of Appeal. Mailed copy to Douglas L. Molde, Esq., Stephen R. Elias, Esq., Benson D. Scotch & David L. Kalib, Esq., Judge Coffrin, Court Reporters and Mr. Fusaro.	36
" "	" Intervenor Pltff. Vt. Welfare Rights Assoc.'s Motion to Proceed in forma pauperis.	37
" "	" Intervenor Pltff. Vt. Welfare Rights Assoc.'s Request to extend time in order to perfect appeal.	38
" 28	" Affidavit in support of Motion to Proceed on appeal in Forma Pauperis, Vt. Welfare Rights Assoc.. Pltff-Intervenor.	39.
Feb. 1	" Pltffs' Notice that no portion of transcript is to be included in the record.	40
" 21	" Order--Court finds appeal is not frivolous. Motion of Pltff and Intervenor to proceed in forma pauperis on appeal is granted. Mailed copy to attorneys.	41
March 1	Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N. Y., N. Y. Attys. notified.	

THOMAS MOORE,
EDWARD ARBUISO,
Individually and on behalf of
all other persons similarly
situated,
Plaintiffs

**CIVIL ACTION
NO. 73-2**

EDWARD THORNTON,
Franklin County District
Director of the Vermont
Department of Social
Welfare,

Defendants

A. FACTS

- A-7**

2. The defendant lacks knowledge and information sufficient to form a belief as to the allegations numbered 1, 2, 3, 4, 29, 33, and 36.

3. The allegations numbered 19, 20, 34 and 35 are denied.

4. The allegations numbered 9 and 10 are denied in part in that a conclusion as to

- a) the inclusion of availability of jobs to low income persons and welfare recipients, and
- b) the conclusion that the personnel policies of the State of Vermont do not comply with the statutes mentioned.

B. NOTICE

Welfare recipients and low income people come in many varieties. With respect to welfare recipients, there are categorical recipients who receive benefits from various programs such as Aid to the Aged (AA), Aid to the Blind (AB), Aid to the Disabled (AD) and Aid to Needy Families with Children (ANFC). In addition to these

categorical recipients, there are recipients of General Assistance (GA) who are not regular welfare recipients but recipients of welfare for emergency purposes. See Title 33 §3001 f.f. There are also individuals who receive only Medicaid benefits from the Department. The latter two groups are "irregular" recipients of welfare benefits.

It is the Department's position that giving of notice is the plaintiff's burden, see Eisen vs. Carlisle Jacquelin, Docket Nos. 721521, 30934 (2d Cir., May 1, 1973). Although plaintiff attempts to distinguish the Eisen case on the basis of the facts involved, the principle that where the plaintiff is bringing the action, the burden of notice is on said plaintiff, should hold. Through discovery, plaintiff could easily obtain the names and addresses of all categorical welfare recipients.

With respect to those people receiving General Assistance and Medicaid, since they are "irregular" clients of the Department, it is impossible to give them notice. Because there is no computer printout available listing these people, and since they do not receive regular monthly or periodic payments from the Department, defendants would move that the recipients of these latter two categories be eliminated if a class is found to exist.

It is true that the categorical assistance recipients receive regular checks, at least monthly, from the State. These payments are not made by the Welfare Department but are made by the State Treasurer as agent for the Welfare Department.*

* If this court instructs the State to give notice by stuffing each and every welfare recipient's check envelope with a notice, then the cost involved to manually stuff approximately 30,000 envelopes and additional postage, if any, should be borne by the plaintiff, on a reimbursement basis.

With respect to so-called low income people, plaintiff has failed to define what a low income person is, and defendants admit they are likewise unable to do so. There is in defendant's way of thinking absolutely no way to identify an individual as being a low income person and as such becomes an unmanageable and undefinable group. The defendants move that if a class is to be found that "low income persons" be removed therefrom.

C. ABILITY OF PLAINTIFFS TO ACT AS A CLASS REPRESENTATIVE

In the instant case we have three named plaintiffs. The intervenor, Vermont Welfare Rights Organization, claiming to represent a class of recipients of welfare. They are not in a position to directly benefit from any favorable relief which the court might grant. That is to say that the organization cannot apply for a position within the Department of Social Welfare. On this basis, we submit with respect to that plaintiff there is no adequate representatives in a class action as defined in Fed. R. Civ. P. 23(a)(4).

With respect to plaintiff Arbuiso, plaintiff's memorandum states that he no longer is in the jurisdiction of the court. Therefore, defendant respectfully moves that he be stricken as a party plaintiff.

Finally, we come to the only other named plaintiff, Thomas Moore. Mr. Moore became a welfare recipient subsequent to the filing of this law suit. However, Mr. Moore has never applied to the Department for positions made available (to be discussed below), which were specifically designed for low income people and specifically designed pursuant to Title 42 U.S.C. 45 C.F.R. 225.

Therefore, with respect to the named plaintiffs, it is the defendant's position that the plaintiffs do not fall within the guidelines as stated in Eisen for representing the client.

D. COMMON SCHEME

There is no regular scheme or common goal with respect to welfare recipients. The only common

item defendant finds is that all welfare recipients are in a similar economic circumstance. There are vast differences within the group as to the abilities of each and every member of the class to qualify for the positions so sought. Since there are no common characteristics with respect to job potential, it is impossible for this court to grant relief in this case since it would necessitate creating thousands of jobs, one for each and every plaintiff. See *Potrero Hill Community, Action Com. v. Housing Authority* 410 F.2d 974. If plaintiffs are seeking the opportunity to apply for existing positions within the Department, then they must go through normal channels (See E and F below).

E. COMPLIANCE WITH FEDERAL REGULATION

As mentioned above, 45 C.F.R. 225.2, states in part that "State plan for certain categorical assistance programs must provide for training and effective use of sub-professional staff as community services . . . and will provide such sub-professional positions as subject to the merit system requirement." In

June, 1973, State of Vermont announced the availability of both case aide and case aide trainee positions. These positions described in the attached circulars were made available to welfare recipients, certain veterans, and disadvantaged persons. This program, and examinations thereunder, were made separate from the State merit system. Totally, there were 16 positions to be filled. Under one hundred individuals applied to take the examinations.

Since Chapter 25 is limited in definition to community service aids and further limited to the social services portion of the welfare area, which has been transferred to the Department of Rehabilitation, it is defendant's contention that they have complied with the published regulations. Furthermore, the relief for which this claim of plaintiff's is based has now become moot.

F. MERIT SYSTEM

The State of Vermont has created a merit system of employment. This system gives equal treatment

to all those applicants for positions in State government. Any interference with the system without basis of law or regulation will deprive an individual who does not fall within the class of plaintiffs from equal employment opportunity in securing positions in State government.

G. LACK OF RELIEF WHICH MAY BE GRANTED

As stated above, it is impossible to grant relief to all the alleged class members in that there cannot possibly be that many positions available. Furthermore, without showing jurisdiction over all members of the class as separate and distinct individuals, relief cannot be granted to the unnamed members of the class. See Zahn vs. International Paper, 53 F.R.D. 430 (1971).

Dated: September 5, 1973

/s/ David L. Kalib

David L. Kalib, Esq.
Assistant Attorney General
Department of Social Welfare
4 East State Street
Montpelier, Vermont 05602
Attorney for Defendants.

CASE AIDE
Various locations around the state

WEEKLY STARTING SALARY: \$109.50*

*Effective July 1, 1973

MAXIMUM WEEKLY SALARY: \$144.50*

*Effective July 1, 1973

QUALIFICATIONS FOR APPLICATION:

Education: Literacy.

Experience: One year of work experience as a Case Aide Trainee, or equivalent experience and training in formal case work activities in a recognized public or private social service agency. College training cannot be substituted for the required training.

SPECIAL NOTE: Possession of an operator's driving permit is required.

DUTIES:

The incumbent assists in determining eligibility of children for day care placement including interviewing of parents and preparation of required forms. (S)he assists in day care placement through investigation of the child's needs, available centers, available transportation, and parental attitudes. (S)he assists in the ongoing provision of child services at the day care facilities and makes investigations and/or recommended provision of alternate or ancillary services. The incumbent may provide emergency short-

term child care service when regular service is unavailable and may assist in the recruitment and licensing of foster homes for both children and adults. (S)he may assist in income maintenance eligibility determinations through interviews, home investigations, and preparation of form inquiries. (S)he may provide client transportation to places of employment, medical facilities, and other service providers, and may assist clients in locating, improving, and/or maintaining household furnishing and equipment. The incumbent performs follow-up contacts with clients as required.

Current vacancies exist.

NOTE: State employees may be required to use their own vehicles on State business.

APPLY TO: The Vermont Department of Personnel, 110 State Street, Montpelier, Vermont, or to any Vermont State Employment Service Office.

6-5-73-101

TASK DESCRIPTION

Service Aides

Educational requirements: none

Experience requirements: none

Salary: \$100 - \$125 per week

The Service Aides will work under the general direction of Resource Services Staff and will perform tasks related to the provision of services to eligible clients of the Social Services Project.

The tasks will include: transporting children or adults to medical facilities, places of employment, other service providers, etc., when other means of transportation cannot be arranged; assisting adults or families in their homes with problems related to household management when such problems appear to be detrimental to adequate family functioning or health; providing emergency, short-term child care services when such services are not available through regular child care providers; and assisting clients in locating housing or household furnishings and equipment.

Other tasks of the Service Aides may include follow-up contacts with clients or other service providers to determine if appointments have been kept, services received and, if necessary, suggest further contacts with the Service Planner.

CASE AIDE TRAINEE
Various locations around the state

WEEKLY STARTING SALARY: \$92.00*

*Effective July 1, 1973

MAXIMUM WEEKLY SALARY: \$120.50*

*Effective July, 1, 1973

QUALIFICATIONS FOR APPLICATION:

Entry into the trainee level is restricted to individuals who meet at least one of the following criteria:

- 1) current recipient of welfare assistance
- 2) veteran as defined in 20 VSA 1543
- 3) disadvantaged person

For further information apply to your local Employment Office.

DUTIES

As a trainee may observe or assist in determining eligibility of children for day care placement by participation in parent interviews or completion of elementary forms. May participate in day care placement functions by assisting a superior in determining available centers and transportation facilities. May observe or participate in procedures involved in determining child needs and parental attitudes. May provide emergency short-term child care service and transportation to clients. Performs a number of other

aid functions in keeping with skills and training level. May attend formal training classes in pertinent discipline areas.

A current vacancy exists.

NOTE: State employees may be required to use their own vehicles on State business.

APPLY TO: The Vermont Department of Personnel, 110 State Street, Montpelier, Vermont, or to any Vermont State Employment Service Office.

6-5-73-100

STATE OF VERMONT

Classified Service Opportunities

ANNOUNCEMENTS - are issued periodically for distribution throughout State agencies and Employment Service offices, and are always advertised in Montpelier, Burlington and Rutland daily newspapers.

APPLICATIONS - for employment will normally be accepted for a minimum of two weeks from the date the announcement is issued. Forms may be obtained from the Vermont Department of Personnel, Montpelier, Vermont 05602, from State Employment Service offices and from agency personnel offices.

ELIGIBILITY - to compete in examinations will be determined by the Vermont Department of Personnel on the basis of the minimum qualifications for application in the announcement. Each applicant will be notified of his eligibility prior to the date of the examination and will be advised of the time and place to appear for the examination.

EXAMINATIONS - may consist of a written test, a performance test, an oral test, a rating of the candidate's training and experience (as shown on his application) or a combination of two or more of these tests. Each candidate who competes in an examination is notified in writing of his final score.

REGISTER - a list of all candidates who pass the examination and indicate that they are available for employment.

CERTIFICATION - referral to a hiring agency of the candidates on the register with the three highest scores available for the position at the time and at the location where the position is open.

APPOINTMENT - of one candidate will be made by the hiring agency from the certificate.

Classified Employee Benefits

- *Twelve days paid vacation per year.
- *Twelve days paid sick leave earned yearly.
- *Twelve holidays with pay per year.
- *Periodic merit salary increases.
- *Social Security and contributory retirement.
- *Contributory group life insurance.
- *Optional contributory group hospitalization.
- *Optional major medical insurance coverage.
- *A career in public service.

VERMONT STATE GOVERNMENT POSITIONS CASE AIDE TRAINEE - HUMAN SERVICES

Applicant's Name: _____

Applicant's Status:

Welfare Recipient? (Cash grant or good stamps) Yes No

Unemployed? (See explanation on reverse side) Yes No

Underemployed? (See explanation on reverse side) Yes No

Resident of Vermont? (See explanation on reverse side) Yes No

Eligible for Special Preference?
(Indicate below as many bases for
Special Preference as apply)

— Disabled veteran of the Vietnam era or
Special Veteran (See explanation on
reverse side)

— Other veteran, serving since August 5, 1964

_____ Disadvantaged (See explanation
on reverse side)

_____ Family living below the poverty
line, or on welfare

Position Applied For: _____

I certify that this applicant: (1) warrants special preference as indicated above; (2) meets the minimum qualifications of the position for which he is applying; (3) is aware that applicants who fail to qualify for "special preference" will be referred to hiring agencies only when there are no "special preference" applicants to refer, and that the unemployed are given preference over the underemployed.

A completed State of Vermont Application for Employment is attached.

(Employment Service Representative)

(DES Local Office)

(Date)

Revised June 28, 1973

DEFINITIONS

For purposes of establishing eligibility:

unemployed is a person who has been without work for 14 days or longer (unless his most recent employment was with the State, then he must have been without work for at least 30 days) and (1) had made specific efforts to find a job within the past 4 weeks, or (2) is waiting to be called back to a job from which he has been laid off.

underemployed is a person working part-time for an employer other than the State and who is seeking full-time work; or working full-time for an employer other than the State with wages which, when added to other income of adults 16 or over in his immediate family living in the same household, are below the poverty level.

a Vermont resident is a person who is now living in Vermont and who expresses an intention to remain in Vermont.

For purposes of establishing eligibility for "Special Preference":

Special Veteran is a person who served in the Armed Forces in Indochina or Korea, including the waters adjacent thereto, on or after August 5, 1964, and who received other than a dishonorable discharge.

Vietnam-era Veteran is a person who served in the Armed Forces since August 5, 1964, and who received other than a dishonorable discharge.

Disadvantaged - based on current Department of Labor Disadvantaged Criteria.

DEFINITION:

Case aide activity involving on-the-job and/or formal training in a social service or income maintenance setting within the Human Services Agency. Work is performed under the immediate supervision of a trainer, para-professional, or professional employee. Period of traineeship is normally one year.

EXAMPLES OF WORK PERFORMED:

As a trainee may observe or assist in determining eligibility of children for day care placement by participation in parent interviews or completion of elementary forms. May participate in day care placement functions by assisting a superior in determining available day care centers and transportation facilities. May observe or participate in procedures involved in determining child needs and parental attitudes. May provide emergency short-term child care service and transportation to clients. Consistent with skills and training level, performs a number of other aide functions in either

services or income maintenance activities. May attend formal training classes in pertinent discipline areas.

REQUIRED KNOWLEDGES, SKILLS & ABILITIES:

Ability to comprehend and carry out routine instructions, either written or oral.

Ability to gather non-technical information and apply it to the subject case(s).

Ability to prepare and deliver elementary reports either orally or in writing.

Ability to acquire knowledge of social services available in the area.

Ability to relate to individuals in a friendly and helpful manner.

QUALIFICATIONS FOR APPLICATION:

Entry into the trainee level is restricted to individuals who meet at least one of the following criteria:

- 1) current recipient of welfare assistance
- 2) veteran as defined in 20 VSA 1543

- 3) disadvantaged person which is further defined as "a poor person"*, without suitable employment, and who is either:
- a) a school dropout
 - b) member of a minority group
 - c) under 22 or over 45 years of age, or
 - d) handicapped.

*Current OEO poverty guidelines are as follows:

<u>Family Size</u>	<u>Non-farm Family Income does not exceed</u>	<u>Farm Family Income does not exceed</u>
1	\$2,100	\$1,800
2	2,725	2,325
3	3,450	2,950
4	4,200	3,575
5	4,925	4,200
6	5,500	4,725
7	6,200	5,275

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

THOMAS MOORE,
VERMONT WELFARE RIGHTS
ORGANIZATION,
Plaintiffs

V.

PAUL PHILBROOK,
Commissioner of the Vermont
Department of Social Welfare
JOSEPH C. DENNY,
Acting Commissioner of the
Vermont Department of
Personnel
JOSEPH HANDY,
Commissioner of the Vermont
Department of Rehabilitation,
Defendants

CIVIL ACTION
NO. 73-2

PLAINTIFFS' MOTION TO WITHDRAW MOTIONS TO
AMEND THE COMPLAINT, DATED AUGUST 15,
1973 AND AUGUST 16, 1973, AND MOTION FOR
LEAVE TO FILE A SECOND AMENDED COMPLAINT

Plaintiffs respectfully request leave of this Court a) to withdraw pending motions to amend their Complaint, said motions dated August 15 and August 16, 1973, and b) leave of this Court to file a Second Amended Complaint. Plaintiffs made a prior motion to amend Complaint in March, 1973

which motion was granted by this Court. The granting of this motion would therefore constitute leave to file a second amended complaint.

Plaintiffs make their motion on the following grounds:

1) Discovery has disclosed facts which materially change the theory under which Plaintiffs now wish to seek relief from this Court.

2) Plaintiffs wish to alter their prayer for relief to best accord with the facts as they have been discovered.

3) Plaintiffs wish to drop their allegations that this is a class action.

4) Plaintiffs wish to add an additional defendant as a result of imminent shifts of responsibility within the State Human Resources Department which will involve a new Subdivision of said Department in respect to Plaintiffs' claims; and

5. Plaintiffs wish to substitute the name of present commissioner of Social Welfare, Paul Philbrook, for the former commissioner Joseph Betit.

Respectfully submitted,

/s/ Stephen R. Elias, Esq.

Stephen R. Elias, Esq.
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

THOMAS MOORE, VERMONT)	
WELFARE RIGHTS ORGANIZATION,)	
Plaintiffs)	
)	
V.)	CIVIL ACTION
)	No. 73-2
PAUL PHILBROOK,)	
Commissioner of the Vermont)	
Department of Social Welfare)	SECOND AMENDED
JOSEPH C. DENNY,)	<u>COMPLAINT</u>
Acting Commissioner of the)	
Vermont Department of Personnel)	
JOSEPH HANDY,)	
Commissioner of the Vermont)	
Department of Rehabilitation,)	
Defendants)	

I. PRELIMINARY STATEMENT

1. Plaintiffs seek a declaration that the present personnel policies of the State of Vermont pertaining to the Department of Social Welfare's subprofessional employees are invalid, and a preliminary and permanent injunction ordering the Defendants to provide for the training and effective use of public assistance recipients and other persons of low income as subprofessional employees in the Vermont Department of Social Welfare in accordance

with Federal Statute [42 U.S.C. §§302 (a) (5) (B), 602(a) (5) (B), 1202(a) (5) (B), 1382 (a) (5) (B), 1396a (a) (4) (B), Regulation (45 CFR §225) and the State of Vermont own State Plant.

II. JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1331 which provides for original jurisdiction of this Court wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

3. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202.

III. PLAINTIFFS

4. Thomas Moore resides at 25 Greenwich Street, Swanton, Vermont.

5. Mr. Moore is the father of 4 girls and a boy, all of whom are under 14, by his first marriage for whose support he must contribute \$10.00 per week.

6. Mr. Moore and his present wife, Beverly, are the parents of 10 children, 7 of whom are dependants.

7. Mrs. Moore is employed by the Champlain Valley Office of Economic Opportunity and has a net income from this employment of \$185.00 every two weeks.

8. Mr. Moore was employed by Softlight, Swanton, Vermont, on the WIN program prior to October 6, 1972 at which time he was laid off.

9. Mr. Moore is currently in receipt of ANFC-UF benefits.

10. Mr. Moore applied to the Department of Personnel for a subprofessional job with the Department of Social Welfare. He did not receive an answer. Subsequent to this first application, he again applied for a subprofessional position through his attorney, and was informed by the Department of Personnel that no special subprofessional jobs existed as such on a priority basis for welfare recipients and low income persons, although he was referred to certain special employment programs outside of the normal staffing of the welfare department.

11. Vermont Welfare Rights Organization
(VWRO) is an incorporated association which represents the interests of its members in respect to the various public assistance, general assistance and medical assistance programs in effect in Vermont. Members of the Welfare Rights Organization are subjected to the policies complained of herein.

12. Defendant, Paul Philbrook, is the Commissioner of the Vermont Department of Social Welfare.

13. Defendant Edward Thornton, is the District Director in Franklin County of the Vermont Department of Social Welfare.

14. Defendant Joseph Denny is the acting Commissioner of the Department of Personnel.

15. Defendant Joseph Handy is the Commissioner of the Vermont Department of Rehabilitation. On information and belief, the Vermont Department of Rehabilitation will soon be assuming the service responsibilities formerly held by the Department of Social Welfare.

IV. CAUSE OF ACTION

16. Pursuant to 42 U.S.C. §§302(a)(5)(B), 602(a)(5)(B), 1202(a)(5)(B), 1352(a)(5)(B), and 1396(a)(4)(B), and 45 CFR 8 §225. Defendants are required to employ welfare recipients and other low income persons in subprofessional positions with the welfare department. Recruitment and testing for these positions may be conducted outside of the normal merit system rules if necessary to effectuate the Congressional intent in respect to the hiring of welfare recipients and other low income persons or subprofessionals.

17. Pursuant to the Federal requirements, the State of Vermont submitted a Plan to the U.S. Department of Health, Education and Welfare (hereinafter HEW) in which it represented that it was in compliance with the requirement for the recruitment and hiring of welfare recipients and other low income persons for subprofessional positions. The Plan also commits the State to an annual progression in the number of subprofessional positions within the agency capability.

18. At the time the Plan was submitted to HEW, the State of Vermont employed 24 welfare recipients and other low income persons as Homemakers. Subsequent to the submittal of the Plan, the State of Vermont eliminated these positions and did not provide for an equivalent number of positions to function in some other capacity.

19. As of June, 1973, the Department of Social Welfare initiated a program for the recruitment and training of 16 subprofessionals as "case aide trainees". This program does not place the Department at the level of subprofessional utilization that was present when the Department submitted its plan in 1969, and thus does not represent an annual progression in the number of subprofessional positions promised by the State in its plan. Further, the "Case Aide Trainee" program is open not only to welfare recipients and other low income persons, but is also open to Veterans, regardless of their economic status. Opening the competition for these jobs to veterans negates the priority status for welfare recipients and low income persons required by law, and promised by the Department in its plan.

20. The State Plan submitted by Defendant Philbrook's predecessor to HEW constitutes a binding contract between the State of Vermont and the United States Government and its provisions may be enforced by the intended beneficiaries of the contract. The intended beneficiaries of the Plan provision under discussion are the welfare recipients and low income persons who might obtain employment under this program, and the welfare recipients who will benefit from having persons from their community working with them.

21. The provisions in the State Plan relating to the recruitment and employment of welfare recipients and other low income persons for sub-professional positions are required by Federal law, and the failure of the Defendants to comply with their own state plan also means that the Defendants are out of compliance with Federal Law.

22. Plaintiffs have no adequate remedy at law; and have been and will continue to be injured in that they will be deprived of the opportunity to

compete among other welfare recipients and low income persons for subprofessional jobs within their skill and competence, unless this Court grants the requested relief.

WHEREFORE, Plaintiffs respectfully pray that this Court:

- 1) Enter a judgment declaring the Defendants to be in breach of their contractual obligations in respect to the recruitment and hiring of welfare recipients and other low income persons for subprofessional positions, and declaring the Defendants to be in violation of Federal law applicable to the hiring of welfare recipients and other low income persons for subprofessional positions.

- 2) Enter a preliminary and permanent injunction preventing the Defendants from further failing to perform on their contractual and Federal obligations in respect to the hiring of welfare recipients and other low income persons for subprofessional positions.

- 3) Order the Defendants to submit a Plan to this Court no later than 30 days subsequent to the

granting of this order in which an action program
of compliance with this Order is detailed.

4) Grant such other relief as the Court may
deem equitable and just.

Dated at Burlington, Vermont

this 17th day of September, 1973.

/s/ Stephen R. Elias
Stephen R. Elias, Esq.
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont 05401

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

THOMAS MOORE,)	
EDWARD ARBUISO,)	
Individually and on behalf of)	
all other persons similarly)	
situated,)	
Plaintiffs)	
V.)	CIVIL ACTION
JOSEPH BETIT,)	NO. 73-2
Commissioner of the Vermont)	
Department of Social Welfare,)	
JOSEPH C. DENNY,)	TRIAL
Acting Commissioner of the Vermont)	MEMORANDUM
Department of Personnel,)	
EDWARD THORNTON,)	
Franklin County District Director)	
of the Vermont Department of)	
Social Welfare,)	
Defendants)	

1. Jurisdiction

A. The defendants contend that plaintiff failed to state a claim upon which relief can be granted and a motion to dismiss pursuant to 12(B)(6) is in order with respect to any claim that the Department use of sub-professional personnel to fulfill its income maintenance positions. Both the statute (42 U.S.C. 602(a)(5)(B) and the underlying regulation are limited to sub-professional positions in the social services area, namely community aides.

B. The complaint should be dismissed on the ground that the court lacks jurisdiction because the amount in controversy is less than \$10,000, per plaintiff. The defendants will show that pursuant to Snyder v. Harris, 394 U.S. 332 (1966) no aggregation of claims by individual plaintiffs should be allowed. In addition, plaintiff has failed to show where there has been \$10,000 claim in controversy for each plaintiff. Also, see Zahn v. International Paper, 53 F.R.D. 430 (1971).

2. Class Action

A. The defendants will show that amongst the named plaintiffs there is not one that adequately or properly can be considered a class representative as set forth in Fed. R. CIV.P. 23(A)(4). The pre-trial stipulation entered into with the plaintiff as to the class action only goes to the definition of a low income person and not to whether notice can be given to that group.

3. Department Sub-professional Plans

In 1969, the Department of Social Welfare (hereinafter DSW) submitted to the U.S. Department of Health, Education and Welfare a plan for the use of sub-professional personnel in compliance with Federal Statute and

Regulation.¹ The plan included the use of sub-professional personnel in fulltime and parttime positions with primary emphasis on recruiting of persons who were either welfare recipients or from low income groups. In fact, the program consisted of recruiting homemakers who would be trained by our district offices. The plan also included a possibility for an annual progression in the utilization of an increasing number of sub-professionals within the agency's capacity.

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42 U.S.C. (a)(5)(B) provides "For the training and effective use of paid sub-professional staff, with particular emphasis on fulltime or parttime employment of recipients and other persons of low income as community service aides, in the administration of the plan is the use of non-paid or partially paid volunteers. In a social service volunteer program in providing services to applicants and recipients in assisting any advisory committees established by the State agency."

The defendant contends that the 1969 plan filled the statutory requirement. Furthermore, in addition to repeating the statutory language, 45 CFR 225.1(a), the regulation goes on to say under paragraph 225.2(a)(1) that "the State Plan will provide that such sub-professional positions are subject to the merit system requirements except where special exemption is approved on the basis of the state alternative plan for recruitment and selection among the disadvantaged. The disadvantaged of persons who have potential ability for training and job performance to help assure achievement of program objectives."

In complying with 45 CFR Part 225, the Department recruited a total of 24 parttime homemakers. There was an appropriation for nine fulltime people, but it was thought that this appropriation was better utilized by creating 24 parttime positions.

Nowhere in the State Plan nor in the statutory or regulatory framework are there any guidelines for the administration of a State Plan. In addition, there are no minimum requirements set forth for a State Plan.

The defendant contends that the 1969 Plan fulfilled the requirements set forth by 45 C.F.R. Part 225. Furthermore, it is the defendants' contention and they will show that the intent of the legislation as shown by the Harris Amendment is limited to community service aide programs in the social services and rehabilitation areas.

The defendants also contend that their plan had no certainties or program for expansion and that depended completely upon the Department's available appropriations. In addition, defendants contend that

there is absolutely no federal requirement that priorities be created in the hiring of low income persons or of welfare recipients.

In 1971, the homemaker program was phased out in order for the Department to establish a fulltime case aide program. The reason for this phase out was primarily due to a shifting of appropriation priorities. The Department felt that the monies being spent on this homemakers program could better be spent by increasing personnel in the areas directly relating to categorical welfare recipients. However, in continuing its sub-professional program the DSW in 1970 established, as part of the United States Family Assistance Program (F.A.P.) a program commonly known as The 1115 Public Social Services Project. In July, 1971, this program was initiated with the hiring of seven (7) fulltime temporary sub-professional case aide employees, to augment services of the Department. These positions were not within the State Merit System. All individuals were assigned to the Burlington and Morrisville offices. All of the employees were from a low income group or welfare recipients.

In September, 1973, the seven temporary positions have been brought under the State Merit System and made permanent and part of a new subprofessional program designed, initially, to employ sixteen (16) case aides and case aide trainees. Defendants contend that the new case aide program fulfills both the mandate of Congress as well as the State's own plan, and will also show that it is currently not possible for the State to hire personnel throughout the Department without going through the State's Merit System. There is no foundation in law or regulation for the State to adopt an alternative system. In addition, there is nothing in stature or regulation to suggest that the State is obligated to hire low income, or disadvantaged persons or welfare recipients in the income maintenance area, as the complaint suggests. The statute and regulation in question are strictly limited to sub-professionals in the social services and rehabilitation areas, which as of a recent Executive Order (signed by Governor Salmon, January 12, 1973) are all within the jurisdiction of the Department of Rehabilitation.

Thus from 1969, the defendants have had a sub-professional employment program, and they have in fact made progressive expansion of the initial plan filed with the Department of Health, Education and Welfare. The program has expanded from 9 fulltime (or 24 parttime positions) to 16 fulltime positions. In addition, more than double the amount of State dollars will be spent, assuming the budget request will be approved, in fiscal 1975 than was spent in fiscal 1970.

Respectfully submitted,
KIMBERLY B. CHENEY
Attorney General
State of Vermont

BY:

/s/ David L. Kalib
DAVID L. KALIB
Assistant Attorney General
Department of Social Welfare
4 East State Street
Montpelier, Vermont

STIPULATION

The parties hereto stipulate and agree that venue is properly laid in this District; that the United States District Court for the District of Vermont has jurisdiction over the subject matter hereof; that all proper, necessary and indispensable parties are parties hereto, and to the following facts:

1. Thomas Moore is a welfare recipient.
2. The Department of Social Welfare in an authentic document, has defined poor persons as persons coming within OEO guidelines, and for the purpose of this lawsuit, low income persons may be so defined. All questions as to the practicability of notice in respect to Plaintiffs' allegations of a class action are reserved by the parties.
3. For the purpose of this lawsuit, the term "welfare recipient" shall refer to categorical welfare recipients.
4. Welfare recipients are identifiable as a class from records possessed by defendants.

5. Plaintiff Thomas Moore through is attorney applied prior to the initial filing of this lawsuit for a job with the subprofessional staff of the Vermont Department of Social Welfare.

6. In 1969, the Vermont Department of Social Welfare submitted a plan to the U.S. Department of Health, Education, and Welfare (Hew) which represented the state as operating a subprofessional program with emphasis on homemaking, and which committed the State to an annual progression in the number of such positions within the agency capability.

7. Between July 1969, and December 31, 1969 twenty-four (24) part or full time subprofessional positions within the meaning of the Harris Amendment were available and filled, all of them homemakers.

8. The Vermont Department of Social Welfare never amended, modified, or withdrew its plan submittal alluded to in Stipulation number seven supra.

9. Subsequent to the submission of the plan, and prior to the filing of this lawsuit, the Homemaker program was discontinued.

10. In June of 1973, sixteen (16) full time Case Aide and Case Aide Trainee positions were created by the Department and made available to current recipients of welfare assistance, veterans as defined in 20 VSA 1543, and disadvantaged persons, at a minimum weekly salary of \$92.00.

The Parties further stipulate and agree that the law governing this case this is 42 U.S.C. §§ 302(a)(5)(B), 602 U.S.C. (a)(5)(B), 1202(a)(5)(B), 1352(a)(5)(B), 1382(a)(5)(B), 1396a(a)(4)(B), and 45 CFR §§ 70, 225.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

Thomas Moore, Edward Arbuiso, :
individually and on behalf of :
all other persons similarly :
situated and :

Vermont Welfare Rights :
Association, Intervenor :

V. :

Civil Action

Joseph Betit, Commissioner of :
the Vermont Department of :
Social Welfare, Joseph C. :
Denny, Acting Commissioner of :
the Vermont Department of :
Personnel, Edward Thornton, :
Franklin County District :
Director of the Vermont :
Department of Social :
Welfare :

File No. 73-2

OPINION AND ORDER

Plaintiffs in this action, a welfare recipient and the Vermont Welfare Rights Association, seek a declaratory judgment that certain personnel policies of the State of Vermont as they pertain to the Department of Social Welfare's hiring of subprofessional employees are invalid. They request injunctive relief ordering Defendants to provide for the training and effective

use of public assistance recipients and other low income persons as subprofessional employees in the Vermont Department of Social Welfare. Defendants are officials of the state department affected.

Plaintiffs base their claim upon 42 U.S.C. §§ 302(a)(5)(B), 602(a)(5)(B), 1202(a)(5)(B), 1382(a)(5)(B), 1396(a)(4)(B) (1970) and 45 C.F.R. §225 (1972). These code sections are identical and provide that a State plan for aid to various disadvantaged groups must provide:

for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State Agency.

The provisions were added to the Social Security Act in 1967 by Public Law 90-248 and are part of the several Categorical Assistance Programs established by the Act.

Under the Act and its accompanying regulations, States must submit a plan to the Department of Health, Education and Welfare which specifies the intentions and plans for the State in administering its programs under the Act, for which it receives Federal matching funds. Plaintiffs' claim that once a State announces its intentions with regard to the several programs in a state plan submitted to HEW, it is bound by those representations.

In 1969 the Vermont Department of Social Welfare submitted a plan to HEW which included a description of a program the State had initiated to comply with the 1968 amendments set out above. The program employed 24 homemakers who were recruited from welfare recipients and other low income people and the plan stated that "there will be an annual progression in the utilization of increasing numbers of subprofessionals with the agency capability." Plaintiffs claim that despite the representation by the State that the number of subprofessionals would be increased, the State discontinued the program in 1971.

In essence then the complaint alleges that the state has failed to follow its plan and there is a lack of jobs which are available to the plaintiff and the members of the Vermont Welfare Rights Association.

The complaint was amended several times after it was filed on January 3, 1973. After certain discovery had taken place and the class action allegations contained in the original complaint had been dropped, defendants moved to dismiss the action under Fed. R. Civ. p. 12 for failure to state a claim upon which relief can be granted and for lack of jurisdiction because the amount in controversy did not exceed ten thousand dollars, exclusive of interest and costs. Because we grant the motion to dismiss for lack of jurisdiction, we do not find it necessary to decide whether or not plaintiffs' complaint states a claim upon which relief can be granted.

Since this suit is brought under jurisdiction of 28 U.S.C. §1331 (1970), it is necessary that the amount in controversy exceed ten thousand dollars, exclusive of interest and costs. We find the amount in

controversy in this suit to be one that is not easily determined. Plaintiff Moore claims that he has a right as a low income person and a welfare recipient to have a number of jobs made available to him for which he does not have to compete with economically more advantaged persons. Plaintiff Vermont Welfare Rights Association claims that its membership is aggrieved as a whole by the lack of availability of such jobs. However, the mere unavailability of such jobs carries with it no direct monetary value as far as the plaintiffs are concerned because neither Moore nor the members of the Vermont Welfare Rights Association have a right to the jobs at issue nor is there any guarantee that, if available, they would receive them. That is not to say that the plaintiffs may not have sustained damages due to job unavailability but, if so, this is nothing more than "indirect damage", which it has long been held is too speculative to support jurisdiction under section 1331. See cases collected in Rosado v. Wyman, 414 F. 2d 170, 176-177 (2d Cir. 1969), rev'd on other

grounds, 397 U.S. 397 (1970).

The instant case is not similar to, and is easily distinguishable from, those cases involving welfare recipients in which the plaintiffs challenged cut-offs or reductions in their benefits. E.g., Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

Plaintiff also urges that we should allow aggregation of their claims to reach the jurisdictional amount as was permitted in Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y. 1971). The same speculative infirmity of "indirect damage" would seem to apply to any attempt to aggregate the plaintiffs' claim in this matter. Further, the plaintiffs have no stake in state or federal monies in the sense of Bass, or in a fund for their benefit, as was the case in Berman v. Narrangansett Racing Association, 414 F.2d 311 (1st Cir. 1969), to justify aggregation in this instance.

In addition we have some doubts under the circumstances that plaintiff Vermont Welfare Rights Association should be permitted to aggregate the claims of its members at a time when it, together with plaintiff

Moore, has withdrawn its request for class action status under Fed. R. Civ. P. 23. The Association may be representing its individual members but we are not satisfied under the circumstances that it is free to assert the rights of those members as a class. To hold otherwise it seems to us might render inconsequential or substantially weaken the requirements for class action suits set forth in Fed. R. Civ. P. 23, as discussed by the Supreme Court most recently in Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). We find it unnecessary to decide this question and accordingly do not do so.

However, to the extent necessary we find the right to have the jobs, which are the subject matter of this controversy, made available, as well as the jobs themselves, to be individual and personal to each person who might become entitled to apply for them and rather than amounting to a common and undivided claim on the part of the plaintiffs (which includes the claims of the individual members of plaintiff Vermont Welfare Rights Association), the claims as to each plaintiff must be considered as a separate and distinct. Such a

determination may be unnecessary in view of our conclusion as to the speculative value of the claims discussed previously but in any event it is obvious that we have no alternative but to dismiss the claim for lack of the requisite jurisdictional amount.

It is hereby ORDERED: That this action be and it hereby is dismissed for lack of jurisdiction.

Dated at Burlington in the District of Vermont, this 27th day of December, 1973.

/s/ Albert W. Coffrin
District Judge